

(2009) 04 KL CK 0067

High Court Of Kerala

Case No: RC Rev. No. 36 of 2009 (E)

Abdul Asees

APPELLANT

Vs

Devaki

RESPONDENT

Date of Decision: April 8, 2009**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 15, Order 32 Rule 2, Order 32 Rule 3, Order 32 Rule 5
- Kerala Buildings (Lease and Rent Control) Act, 1965 - Section 11(3), 20, 23, 23(1), 31
- Kerala Buildings (Lease and Rent Control) Rules, 1979 - Rule 11(8), 7
- Limitation Act, 1963 - Section 5

Citation: (2009) 2 ILR (Ker) 694 : (2009) 2 KLJ 387 : (2009) 2 KLT 801**Hon'ble Judges:** Pius C. Kuriakose, J; C.K. Abdul Rehim, J**Bench:** Division Bench**Advocate:** T. Krishnan Unni and R. Ramadas, for the Appellant; S.V. Balakrishnan Iyer K. Jayakumar, P.B. Krishnan, Geetha P. Menon and P.M. Neelakandan, for the Respondent

Judgement

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Pius C. Kuriakose, J.

RCR. 36/09 is filed by the landlord and RCR. 86/09 is filed by the tenant. Both the revision petitions are directed against the judgment of the Rent Control Appellate Authority, Kalpetta. Since facts have been narrated correctly in the judgment of the Rent Control Appellate Authority and also in the order of the Rent Control Court we propose to refer to them only very briefly. The parties are being referred to as landlord and tenant respectively.

2. The rent control petition was filed by the landlord seeking eviction of the tenant on the ground under Sub-section (3) of Section 11 of Act 2 of 1965, viz., the ground that the petition schedule building is required bona fide by the landlord for starting a hardware business for his dependent daughter Rahiya and son-in-law

Muhammed. The landlord alleged that the tenant has got properties and buildings at Balussery, her home town and that she is having income from them. It was alleged that the tenant is having buildings having door Nos. 226 to 230 and 551 to 555 in Ward No. VII of Meenangadi Panchayath in addition to two other buildings standing in her name. The landlord alleged therefore, that if the tenant wants to shift her textile business she has her own building to shift to, and that the tenant is not entitled protection for the second proviso to Sub-section (3) of Section 11 of Act 2 of 1965.

3. The tenant contended that the need put forward by the landlord is only a ruse for getting eviction and that the landlord's son-in-law is working in Gulf a country for many years and that he has landed properties and business" establishments at Koduvally his native town, and has no need for starting hardware business in the petition schedule building. It was alleged that the rent control petition was filed without bonafides in retaliation to the tenant not acceding to the landlord's request for enhancement of rent. The tenant denied the allegation regarding the availability of buildings with her and contended that the buildings made mention of by the landlord are in the possession of tenants and that on the basis of an oral partition, those buildings have been set apart to the share of the tenant's daughter.

4. The evidence at enquiry by the Rent Control Court consisted of the oral testimony of the landlord as PW-1 and the testimony of Sri. Sreenivasan, son of the tenant as RW-1. Documentary evidence on the side of the landlord consisted of Exts.A1 to A6. The tenant's son Sreenivasan was permitted to defend the RCP and to adduce evidence on behalf of his mother Devaky, the tenant. The Rent Control Court on an evaluation of the evidence found that the need put forward by the landlord is bona fide and hence ordered eviction under Sub-section (3) of Section 11. The Appellate Authority on re-appreciating the evidence concluded that the finding of the Rent Control Court regarding the bonafides of the need was correct. However, on the reason that the landlord had prosecuted the rent control petition without appointing a guardian for the tenant who is mentally incapable of defending herself, It was found that the order passed by the Rent Control Court in favour of the landlord was hit by Rules 2 and 15 of Order 32 C.P.C. Accordingly the order was set aside and the RCP was remitted back to the Rent Control Court for fresh disposal in accordance with law. In RCR. 36 of 2009 the landlord challenges the order of the Rent Control Appellate Authority to the extent the eviction order is set aside and matter remanded to the Rent Control Court and in RCR. 86 of 2009 the tenant challenges the correctness of the findings of the Rent Control Court and the Appellate Authority regarding the genuineness of the need projected by the landlord.

5. We have heard the submissions of Sri. T. Krishnan Unni, learned senior counsel for the landlord and also those of Sri. S.V. Balakrishna Iyer, learned senior counsel for the tenant. Mr. Krishnan Unni would submit that the finding of the Rent Control

Court and the Appellate Authority concurrently entered by them that the need projected by the landlord under Sub-section (3) of Section 11 is a bona fide one is based on acceptable legal evidence and hence unassailable. Mr. Krishnan Unni submitted that Rules 2 and 15 of the Order 32 C.P.C. are not at all applicable to proceedings before the Rent Control Court and in this context he drew our attention to Section 23 of Act 2 of 1965. According to him only a few provisions of the CPC have been made applicable. The learned senior counsel submitted that as far as rent control proceedings are concerned it is Sub-rule (8) of Rule 11 of the Kerala Buildings (Lease & Rent Control) Rules which governs and that the authorities are expected to follow the principles of equity, justice and good conscience and not the strict procedural rules of the Code of Civil Procedure. Mr. Krishnan Unni submitted that the tenant's only son Sreenivasan had filed I.A. 926/05 before the Rent Control Court seeking appointment of himself as next friend on the reason that his mother Devaky was no longer capable of taking care of herself and it is considering that IA, that Sreenivasan, DW-1 was permitted to defend the RCP and to adduce evidence for and on behalf of his mother. Mr. Krishnan Unni submitted that Sreenivasan pursued the defence which his mother Devaky had taken in the RCP, adduced evidence in the RCP and himself filed appeal before the Rent Control Appellate Authority in his capacity as the next friend and son of Devaky. The finding of the Rent Control Appellate Authority that the matter was prosecuted without appointing a guardian for the tenant who was alleged to be incapable of defending her case is without any basis. In the view of the Rent Control Appellate Authority that conduct by Sreenivasan of his mother's case without getting himself appointed as next friend after an enquiry under Rule 15 of Order 32 CPC, the appeal which was filed by Sreenivasan claiming himself to be the next friend of his mother should have been rejected. Instead the appeal was entertained and has now been allowed. The decision of the Appellate Authority is most inequitable, so submitted the learned senior counsel.

6. The submissions of Mr. Krishnan Unni were resisted as forcefully as he could, by Sri. S.V. Balakrishna Iyer, learned senior counsel for the tenant. Drawing our attention to the order dated 19-10-2005 passed by the Rent Control Court in IA. 926/05 Mr. Balakrishna Iyer submitted that though the provisions of Rules 2 and 15 of Order 32 were invoked in that LA. The Rent Control Court has cautiously allowed the IA only to the extent of permitting Mr. Sreenivasan to conduct the case and adduce evidence for and on behalf of his mother Devaky. The LA. was never allowed as prayed for. Mr. Balakrishna Iyer would fortify his submissions by a catena of decisions. The learned senior counsel would cite the judgment of the Supreme Court in *Gopalan v. Aboobacker* 1995 (2) KLT 205 to argue that the authorities under the Rent Control Act, the Appellate Authorities as well as the Rent Control Courts are not *persona designata* but they are regular Courts which have been conferred with the power of adjudicating upon the disputes between the landlords and tenants. The learned senior counsel submitted that though the Supreme Court decision in

Gopalan's case was in the context of the powers of the Rent Control Appellate Authority to condone delay u/s 5 of the Indian Limitation Act, the principles laid down in that judgment will abundantly show that the Appellate Authorities under the Act are for all practical purposes regular civil courts governed by all the provisions of the Code of Civil Procedure. Answering the contention of Mr. Krishnan Unni that Order 32 Rule 15 has not been mentioned u/s 23 Mr. Balakrishna Iyer would submit on the authority of the judgment of a Division Bench of this Court in Jullunder C. & N. Mfg. Co. v. Jayadevan 1999 (1) KLT 107 that no provision of the Rent Control Act runs in conflict with Rule 15 of Order 32 CPC and the said ruler being a procedural provision, its principles can be applied to rent control proceedings also. Mr. Balakrishna Iyer placed strong reliance on the judgment of Sri. K. Sreedharan, J. in Abdul Rehiman v. Hameed Hassan Peruvad and Ors. 1995 (2) KLT 794 wherein the learned Judge relying on the judgment of the Supreme Court in Gopalan v. Aboobacker 1995 (2) KLT 205 held that the Rent Control Court is not acting as persona designate but is acting as a regular court. Mr. Balakrishna Iyer submitted that the enquiry which is contemplated by Rule 15 of Order 32 CPC into the alleged mental infirmity of a party to the suit was a judicial enquiry with notice to the allegedly insane person and any order passed against an allegedly insane person without such an enquiry will vitiate the order to the extent of making the same a nullity. The learned Counsel relied on the judgment of this Court in [Balakrishnan Vs. Kalliyani](#), in this context. For the same proposition the learned senior counsel relied on the judgment of the Andhra Pradesh High Court in [Duvvuri Rami Reddi Vs. Duvvudu Papi Reddi and Others](#), . Strong reliance was placed by the learned Counsel on the judgment of the Supreme Court in [Ram Chandra Arya Vs. Man Singh and Another](#), in support of the argument that decree passed against a lunatic without the appointment of a guardian for him as per procedure contemplated under Rules 3 and 15 of Order 32 is a nullity. To argue that an enquiry as contemplated by Rule 15 of Order 32 is mandatory and that such an enquiry can be held even at the appellate stage Sri. Balakrishna Iyer relied on the judgment of the Madras High Court in S. Chattanatha Karayalar v. Vaikuntarama AIR 1968 Mad 346. Mr. Balakrishna Iyer submitted that once the court is informed or it comes to the notice of the court that a party before the court is by reason of unsoundness of mind or otherwise incapable of taking care of his interest, it is the court's duty to hold necessary enquiry and appoint guardian or next friend as the case may be. Mr. Balakrishna Iyer relied also on the judgment of a Division Bench of the Bombay High Court In [Somnath Vs. Tipanna Ramchandra Jannu](#), . The learned senior counsel relied on the judgment of Kochu Thommen, J. in Neroth Oil Mills Co. Ltd. v. Commr. of Income Tax 1987 (2) KLT 243, of Pareed Pillai, J. in Maideen Bava Rawther v. John Xavier 1990 (2) KLT 953 also for the same proposition. Strong reliance was placed by the learned senior counsel on the judgment of a Full Bench of this Court in Pankajaksha Kurup v. Fathima 1998 (1) KLT 668 (F.B.) wherein their Lordships of the Full Bench have held that if a decree is passed against a minor without appointing a guardian, the decree is a nullity and hence void and not merely voidable. The

learned senior counsel would, lastly rely on the judgment of the Supreme Court in *Kasturi Bal and Ors. v. Anguri Chaudhary* AIR 2003 SC 1773 to argue that before entering a finding as to whether a party was incapable of protecting his interest by reason of his mental infirmity, an enquiry had to be conducted by the trial court itself.

7. Mr. Balakrishna Iyer would assail the finding of the Rent Control Court and the Appellate Authority regarding the bonafides of the need projected by the landlord under Sub-section (3) of Section 11. But according to us, the argument of the learned senior counsel in challenge of those findings concurrently entered by the courts below were not very forceful in view of the well defined contours of this Court's powers u/s 20 to re-appreciate the evidence and substitute factual findings concurrently entered by the Rent Control Court and the- Appellate Authority on the basis of evidence recorded in the case.

8. We have very anxiously considered the rival submissions addressed before us by the learned senior counsel for the landlord and the tenant respectively. It is by now trite that the Rent Control Court and the Appellate Authority adjudicating disputes between landlords and tenants function not as persona designate and are discharging for all practical purposes judicial functions which are to be discharged by them in other adjudicatory jurisdictions including the regular civil jurisdiction. Nevertheless it cannot be gainsaid that the Rent Control Court and the Appellate Authority are statutory courts to be governed primarily by the provisions of the statute which creates them. It was fairly conceded by Mr. Balakrishna Iyer that he was unable to come across any decision either of the Supreme Court or of this Court or for that matter of any other High Court wherein it is held that all the provisions of the CPC are applicable to proceedings before the Rent Control Court and the Appellate Authority. Section 23 of Act 2 of 1965 is the one provision which extends certain provisions vested in Courts governed by CPC while trying suits to the Rent Control Court and the Appellate Authority. Order 32 CPC is conspicuously absent among the powers enumerated in Clauses (a) to (k) of Sub-section (1) of Section 23. A learned Judge of this Court, Sri. M.P. Menon, J. in *Cheru Ouseph v. Kunjipathumma* 1981 KLT 495 held that in respect of procedural matters all powers which are not specifically denied by the statute or the statutory rules should be vouchsafed to a Tribunal like the Rent Control Court so that the Tribunal can effectively exercise its functions which are essentially judicial in nature. The statutory rules are the Kerala Buildings (Lease and Rent Control) Rules 1979 framed by the Government by virtue of its powers u/s 31 of the Act. In the statutory rules also, we do not find any specific provision pertaining to filing of rent control petitions by or against minors and persons of unsound mind. It can never be in doubt that it may become necessary to institute rent control petitions against minors and also against persons who are of unsound mind at the time of such institution or comes to be of unsound mind during the course of the proceedings. What is the course to be adopted when a rent control petition is instituted by or against a person who is alleged to be a minor or

of unsound mind is the question which naturally arises. Minors and persons of unsound mind being persons under legal disability cannot institute rent control petitions by themselves nor can rent control petitions be instituted against them in their own names. According to us, in such situations the provisions of Order 32 to the extent they do not conflict with any of the provisions in Act 2 of 1965 or the Kerala Buildings (Lease and Rent Control) Rules can be followed. At the same time, the Rent Control Court and the Appellate Authority should not be unmindful of Sub-rule (8) of Rule 11 which specifically enjoins on them the obligation to follow the principles of justice, equity and good conscience in preference to the technicalities of procedural law.

9. It is common ground that the tenant Smt. Devaky was a person of sound mind at the time she was served with notice of the RCP and when she filed the statement of objections in the RCP. On going through the statement objections filed by Smt. Devaky we notice that all conceivable contentions have been raised by her. The situation of Smt. Devaky coming to lose the soundness of her mind is a development subsequent to the institution of the RCP. Mr. Sreenivasan who has filed RCR. 86/09 is the only son of Smt. Devaky. Mr. Sreenivasan is admittedly the one person who has all along been doing business on behalf of his aged mother, in the petition schedule building. Mr. Sreenivasan informed the Rent Control Court through the affidavit which he filed in support of I.A. 926/05 that his mother is no longer a sound person and that she is being treated by a Psychiatrist. This affidavit was attested by none other than the advocate who was thitherto appearing on behalf of Smt. Devaky. Smt. Devaky herself figured as the petitioner in the IA which was filed by the very same advocate. It was the power under Rule 15 of Order 32 C.P.C. which was specifically invoked in the IA. The prayer in the IA was that Sreenivasan, the son of the tenant be permitted to pursue the tenant's defence in the RCP as her guardian. Along with the IA medical certificates issued by the Psychiatrist who was treating Smt. Devaky was also produced. The submission of the learned Counsel for the landlord is that when an affidavit was filed by the only son of the tenant stating that his mother is no longer a sound person and when it was seen that the affidavit was supported by medical certificate issued by a Psychiatrist who has good reputation in the "locality, the landlord did not feel like filing any counter. This is the order which was passed by the Rent Control Court on the above IA.

This petition coming on this day for hearing before me in the presence of Sri. Rajesh K., advocate for the petitioner and Sri. P. Chathukutty, advocate for respondent/petitioner and on the same day the court passed the following:

ORDER

Heard. Allowed. Petitioner Sreenivasan is permitted to conduct the case, adduce evidence for an on behalf of his mother Devaky. Hence IA closed.

10. It is true that the above order does not in so many words appoint Sreenivasan as the guardian of his mother. But the order allows the application and we are inclined to accept the submission of Mr. Krishnan Unni that the above order virtually appointed Sreenivasan as the guardian at litem for his mother on his application. What is more important is that it was on the strength of the above order that Sreenivasan was permitted to adduce evidence in the case. Though for the filing of the IA Sreenivasan had taken the services of his own advocate one Mr. Rajesh, once the IA was allowed Sri. P.C. Gopinath, Advocate who had entered appearance for his mother himself was permitted by Mr. Sreenivasan to pursue the contest. Importantly, even after the IA was filed the very same contentions which -were raised by the tenant who had personally engaged Sri. P.C. Gopinath as her counsel to defend the RCP were allowed to be pursued through Mr. P.C. Gopinath himself. It is seen that Mr. Gopinath cross-examined the landlord PW-1 and he only argued the case on behalf of the tenant. In other words, at all material times Sri. P.C. Gopinath remained the counsel of the tenant Smt. Devaky before the Rent Control Court. We are highlighting this only because, on a survey of the Kerala Buildings (Lease and Rent Control) Rules it appears to us that a party's counsel before the Rent Control Court is given a slightly more important role than that of the counsel for a party in a regular suit. We notice that while the CPC and the CM! Rules of Practice insist on the pleadings being signed and verified by the party, in terms of Rule 7 of the Kerala Buildings (Lease and Rent Control) Rules it will suffice if rent control petition is signed either by the petitioner or by his counsel. What has happened in this case is that Mr. Sreenivasan, the only son of the tenant reported to the Rent Control Court before it started the enquiry in the case that his mother, the tenant was no longer capable of taking care of her interest in the subject matter of the RCP in view of unsoundness of mind. His report was accepted by the Rent Control Court and Mr. Sreenivasan took advantage of the order passed by the court in the application filed by him seeking his own appointment as his mother's guardian. It was by virtue of that order itself that Mr. Sreenivasan could file the appeal. But for that order, the appeal filed by Sreenivasan was liable to be thrown out as appeal filed by an unauthorised person. The question before us is whether we should approve the decision of the Appellate Authority to set aside the order of the Rent Control Court on the only ground that the tenant was not represented by a lawfully constituted guardian despite unsoundness of mind. It is clear to our mind that it will be against all tenants of equity, justice and good conscience to grant approval to the decision taken by the Rent Control Appellate Authority in the facts and circumstances which obtain in this case.

11. While addressing the specific question as to whether it is necessary to follow the procedure envisaged by Order 3.2. in rent control petitions which are filed by or against minors or persons of unsound mind our answer is that substantially the same procedure should be adopted, though not in strict terms of the rules in Order 32. This means that when rent control petitions are filed by or against minors or

persons of unsound mind a next friend/guardian will have to be permitted/appointed for the minor or person of unsound mind as the case may be. It will have to be ensured that the person permitted to function as next friend or appointed as guardian is qualified to be so permitted/appointed. In the case of persons of unsound mind, enquiry akin to the one contemplated by Rule 15 of Order 32 should also be conducted by the Rent Control Court or the Appellate Authority as the case may be. It is settled by a line of decisions that ordinarily any enquiry under Rule 15 of Order 32 can be conducted only with notice to the allegedly unsound person. His presence in the court should be procured by the court which shall conduct a voir dire so as to become convinced prima facie regarding the correctness or otherwise of the allegation regarding the soundness of his mind. Lastly if it conies to that, the court can refer him to a doctor or a team of doctors. It would appear as if no such enquiry comparable to the one which is contemplated by Rule 15 of Order 32 has been conducted in this case and hence the order of the Rent Control Appellate Authority is only to be sustained. We however, are not inclined to sustain the order of the Rent Control Appellate Authority in view of the following reasons:

1. Though in IA. No. 926/05 it was Rule 5 of Order 32 which was specifically invoked by Mr. Sreenivasan, the son of the tenant it is clear to us that the Rent Control Court allowed that application by invoking its inherent powers as a judicial tribunal cast with a duty to adjudicate the disputes between landlords and tenants.
2. Though the Rent Control Court did not insist on the attendance of the allegedly unsound person, the tenant, or conduct a voir dire by putting questions to that person to be satisfied prima facie regarding the soundness of the mind of the person that court had medical certificate produced by Sreenivasan, the son of the tenant strongly supporting the allegation in the affidavit that his mother due to unsoundness of mind is no longer capable of taking care of her interest. It was considering that medical certificate also that the court became inclined to allow the application.
3. Regarding the correctness of the averments in the affidavit submitted by Sreenivasan in support of IA. No. 926/05 there was complete agreement between the parties before the Rent Control Court. To a specific query put by us, Sri. S.V. Balakrishna Iyer, learned senior counsel for the tenant would submit that even if we were to order attendance of the allegedly insane person the tenant and conduct a voir dire we will be convinced that Smt. Devaky, the tenant even now continues to be a person of unsound mind.
4. It is common ground that Smt. Devaky, the tenant and Sreenivasan, her son have no conflicting interest in the subject matter of the rent control proceedings, the building. In fact the admissions and the evidence will reveal that the business is being carried on by Sreenivasan himself in the building on behalf of the tenant by Sreenivasan himself and that it is the personal interest of Sreenivasan also, that adverse order against the tenant in the RCP is averted.

5. The evidence will reveal that Sreenivasan did not leave any stone unturned in substantiating the contentions which had been raised by his mother in the RCP and that he decided to have the case conducted by the very same advocate who had been engaged by his own mother.

6. The rent control appeal was preferred against the eviction order passed by the Rent Control Court by Sreenivasan styling himself as the next friend of his mother on the strength of the order passed by the Rent Control Court in LA. 926/05. Even RCR No. 86/09 is filed before this Court by Mr. Sreenivasan in the same capacity. Though not in so many words, the Rent Control Court by allowing the IA filed by Mr. Sreenivasan has appointed Mr. Sreenivasan as the guardian at litem for his insane mother.

7. No prejudice whatsoever has been occasioned to the tenant Devaky or her son Sreenivasan by the non-conduct of a full-fledged enquiry under Rule 15 of Order 32 CPC by the Rent Control Court. In the instant case the unsoundness of Smt. Devaky's mind is conceded by all parties and established by the medical evidence put in by Sreenivasan, Devaky's only son and de-facto guardian. At any rate it is inequitable to set aside the order of eviction passed in favour of the landlord accepting a contention by Mr. Sreenivasan who is beneficiary of the order passed by the Rent Control Court in IA. No. 926/05.

12. The result of the above discussions is that RCR. No. 86 of 2009 stands dismissed. RCR. No. 36 of 2009 will stand allowed. The judgment of the Rent Control Appellate Authority to the extent it vacates the order of eviction passed by the Rent Control Court is set aside. The order of the Rent Control Court passed under Sub-section (3) of Section 11 is restored. Respondent is given time till 15-11-2009 to vacate the premises subject to the following conditions.

Sri.Sreenivasan S/o Devaky, who is the next friend of the respondent Devaky shall file an affidavit stating that he shall vacate the RCP schedule building peacefully and put the revision petitioner in possession of the same on or before 15-11 -2009 and that he will discharge arrears of rent if any, and will continue to pay rent which falls due subsequently in respect of the building. Affidavit as directed shall be filed on or before 30th May, 2009. If such an affidavit is filed the building in question will not be delivered over to the revision petitioner before 16-11-2009.